(1145)

IN THE

Supreme Court of the United States

No. [redacted] October Term, 1961

5-1

UNITED STATES OF AMERICA, *ex rel.*
CHARLES NOIA,

Respondent,

against

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

BRIEF, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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Convicted in 1942 of Murder in the First Degree, the respondent, together with two co-defendants was sentenced to life imprisonment. Although his co-defendants appealed from the judgment of conviction (thereby setting in motion a chain of legal proceedings which ultimately resulted in the dismissal of the indictment against one co-defendant and the vacatur of the judgment against the other) the respondent, after consulting counsel, decided not to appeal therefrom.

In 1960, however, respondent petitioned the United States District Court for the Southern District of New York for a writ of *habeas corpus*. The District Court, after hearing

argument, dismissed the petition upon the ground that respondent had failed to exhaust his State Court remedies. By a judgment entered on February 7, 1962, the United States Court of Appeals for the Second Circuit reversed the order dismissing the petition for *habeas corpus*. Petitioners now seek a writ of certiorari to review the judgment of the United States Court of Appeals.

Applicable Statutory Provisions

(1) Title 28, Section 2254, United States Code:

> "An applicant for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(2) New York Code of Criminal Procedure, Section 517:

> "In what cases appeals may be taken by defendant. An appeal may be taken by the defendant as of right from a judgment of conviction in a criminal action or proceeding as follows:
>
> 1. • • •;
>
> 2. Where the judgment is other than of death in the City of New York (a) to the Appellate Division of the Supreme Court of the department in which the conviction was had, from a conviction by the Supreme Court or by the Court of General Sessions of the County of New York or a County Court, or from a conviction

by a Court of Special Sessions; (b) to the Appellate Part of the Court of Special Sessions, from a conviction by a City Magistrate;

"• • •."

Question Presented

Under the provisions of Section 2254 of the United States Code does the failure of the respondent to appeal from judgment of conviction now bar him from obtaining a Federal writ of *habeas corpus?*

Argument

We submit that the requirements of Title 28, Section 2254, United States Code, mandate an exhaustion of State remedies as a condition precedent to invocation of Federal jurisdiction.

In *Brown* v. *Allen*, 344 U. S. 443 (1953), this Court considered at some length the question of the exhaustion of State remedies, required by 28 U. S. C. § 2254. While it held that repetitious applications to State courts were not required, it apparently concluded that a federal question must be presented to the State courts by at least *one* post-conviction procedure, where an adequate remedy was available in such courts (pp. 448-9).

Interestingly enough, the Court below has heretofore strictly adhered to the provisions of § 2254. In *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (1957), it held that a failure to appeal to the New York Court of Appeals from the affirmance of a judgment of conviction by the Appellate Division amounted to a failure of exhaustion of State remedies under § 2254 and, therefore, that a petition to the District Court for *habeas corpus* was properly denied.

In *United States ex rel. Martine* v. *Williams*, 174 F. 2d 582 (1949), the Court below similarly held that, in order to exhaust State remedies, the petitioner must prosecute an available appeal "to the highest New York court open to him." It stated: "As we interpret 28 U. S. C. A. § 2254, the petitioner must have exhausted the State remedies available to him at the time of filing the petition for *habeas corpus*" (p. 584). Although it found that he had exhausted the State remedies available to him by his application for a writ of error *coram nobis* in 1946, it noted that in 1947 the State statute was amended to give him the right of appeal and that his failure to perfect this right of appeal barred relief under § 2254.

In *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645 (1960) cert. den. 364 U. S. 922 (1960), the Court below held that the relator failed to exhaust available State remedies as required by 28 U. S. C. A. § 2254, by his failure to present the question of coercion for review by this Court after affirmance of the conviction by the New York Court of Appeals.

We submit that in view of the prior decisions of the Court below involving exhaustion of State remedies within the meaning of 28 U. S. C. § 2254, the State of New York should be permitted an opportunity to challenge the judgment herein.

CONCLUSION

The petition for certiorari should be granted.

Dated: Albany, New York, April 30, 1962.

Respectfully submitted,

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